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In the Supreme Court of the United States

OCTOBER TERM 1969

No. 28

UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE PUBLIC UTILITY COMMISSIONER OF OREGON

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This is a direct appeal from a final judgment of a unanimous three-judge District Court upholding the action of the Interstate Commerce Commission approving the applications of the Great Northern Railway Company (GN) and Northern Pacific Railway Company (NP) to merge subject to certain conditions. The approved consolidation includes certain jointly and wholly controlled subsidiaries of the GN and NP, namely, the Chicago, Burlington & Quincy Railroad Company (Burlington), Spokane, Portland and Seattle Railway Company (SP&S) and Pacific Coast R. R. Co.

Appellee, the Public Utility Commissioner of Oregon,

is the administrative agency for the State of Oregon vested by statute with the power and duty to administer the laws of Oregon relating to transportation and public utilities companies. Pursuant to his duties, appellee, since filing a petition in March 1961 for intervention in the I.C.C., has appeared and represented the interests of the State of Oregon in this case.

Oregon supports this merger as conditioned by the I.C.C. in its order of approval.

QUESTION PRESENTED

Whether, as held by the District Court, the Interstate Commerce Commission's decision is supported by adequate findings and by substantial evidence that the merger as conditioned is consistent with the public interest.

STATEMENT

The primary interest of Oregon in these proceedings has been, and is, with preserving and obtaining keen intramodal or railroad competition in Oregon and related territories in the Northwest. In addition, we have been concerned about the effects of the merger upon railroad employment and payroll in Oregon, particularly in the Portland area.

The effects of the conditioned and approved merger upon railroad competition and service will be discussed below. However, the principal railroad systems presently serving Oregon shippers may be briefly outlined here as follows:

(1) The Southern Pacific Company (SP). The SP

serves Portland and carries more carload freight traffic in Oregon than does any other railroad. (App. 986) The SP competes for east-west transcontinental traffic both via its route to the Ogden, Utah gateway and via its long haul through California and into St. Louis. The SP also competes for north-south traffic moving along the Pacific Coast.

(2) The Union Pacific Railroad Company (UP). The UP carries about 23 percent of the total carload freight traffic in Oregon. (App. 986) The UP serves Portland and carries east-west transcontinental traffic via its central route. It also provides the shortest rail route, along the south bank of the Columbia River, between Portland and Spokane. In addition, the UP provides north-south service between Seattle, Portland and other areas, including southern California.

(3) The GN, NP and SP&S. The GN and NP jointly own SP&S which in turn has certain other subsidiary lines in Oregon.[①] The SP&S has about 500 miles of main line track in Oregon and Washington and, except for the UP, provides the most direct route between Portland and Spokane. (App. 72, 563) The SP&S and its subsidiaries carry more of the total carload traffic in Oregon (approximately 18 percent) than does the GN (10 percent), or the NP (7 percent), or the GN and NP combined (17 percent), (App. 986) These roads provide east-west transcontinental service and they provide north-south service between Portland and points north. The GN also

① The SP&S wholly owns and controls the Oregon Electric Railway Company and Oregon Trunk Railway which are operated as part of the SP&S. (App. 563-564)

extends south and east to Bieber in northern California, where it connects with the Western Pacific.

(4) The Western Pacific Railroad Company (WP). The WP, which reaches Oregon in connection with the GN, competes via the inside (Bieber) route both for east-west transcontinental traffic and for north-south Pacific Coast traffic. The WP operates to its eastern junction in Utah where its traffic is turned over principally to carriers competing with the UP. The WP also forms competitive north-south and east-west systems in connection with the Atchison, Topeka & Santa Fe Railway Company (Santa Fe) through Stockton, California.

At present the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) does not directly serve any points in Oregon. The Milwaukee's service to Portland, and a connection there with the SP, depends upon a bridge carrier. The Milwaukee's principal east-west connection to and from Oregon is the UP between Portland and Marengo in western Washington. The fact that the Milwaukee does not serve Oregon directly, together with routing restrictions in connection with its routes to and from Oregon, deters Oregon shippers from using the Milwaukee.

After the I.C.C. issued its First Report, in which the merger was denied approval, the Northern Lines petitioned for reconsideration. They then, among other things, expressed a willingness to accept all conditions sought by the Milwaukee, including entry into Portland, and to accept attrition conditions to guarantee jobs and

income for their employees. These concessions were not anticipatd. Previously the Northern Lines had vigorously opposed such conditions and it appeared that the imposition of these conditions would preclude consummation of the merger. (App. 93) Accordingly, Oregon had opposed the merger, as we assumed it was not possible to obtain conditions as substantial as those now imposed by the Commission.

In view of the benefits of the merger and the conditions offered in the reconsideration petition, Oregon, like many other parties, withdrew its opposition to the merger. (App. 268) By letter dated August 1, 1966, to the I.C.C., we explained the reasons for our change of position:

> "Entry of the Milwaukee to Portland will strengthen rail competition, improve the supply of rail cars, and make that railroad an active competitor for transcontinental traffic from or to Oregon, as well as offering the public additional through routes between California and the Pacific Northwest. The opening of additional gateways with the Milwaukee and Northwestern will provide routes presently closed to our shippers. The Central Oregon (Bieber) route, and the Klamath Falls gateway will be greatly strengthened. Elimination of dual switching charges has long been needed and will be a real benefit for the area. New job security agreements for GNP&B employees, together with the advent of new Milwaukee Railroad employees will tend to reduce the feared loss of payroll. The strengthened financial position of the merged GNP&B line could be highly significant to Oregon's future in both the long and short run."

ARGUMENT

I. THE MILWAUKEE CONDITIONS WILL CLEARLY CREATE AND INCREASE RAILROAD COMPETITION.

A. **Entry of the Milwaukee into Portland.** Since the Milwaukee does not serve Oregon directly and since routing restrictions also deter its use by Oregon shippers, the Milwaukee does not provide an effective route. Under the merger conditions, the Milwaukee's entry into Portland will open up new rates, service and car supply for Oregon shippers both on transcontinental traffic and on traffic between Oregon and Washington or California. The merger conditions will make the Milwaukee a strong competitor for Oregon traffic.

The Milwaukee will for the first time have a direct connection with the SP at Portland. This is particularly important because of the large volume of traffic originated, terminated and carried by the SP in Oregon. (App. 986) As noted above, the Milwaukee must now rely upon a bridge carrier in order to move traffic between any one of its western junctions and the Portland gateway with the SP. Each of the alternative bridge carriers is a Milwaukee competitor—the GN, NP or UP. With the Portland entry condition, the Milwaukee will no longer need to rely upon those bridge carriers and instead will interchange directly with the SP at Portland. Neither Milwaukee's rates nor its service will depend upon the concurrence or performance of bridge carriers and it will become a rate-making transconti-

nental carrier.[9] The I.C.C. and the District Court were entirely correct when they concluded that the Milwaukee "will become for the first time a much strengthened competitor, realistically vying for long haul traffic at every major point served by Northern Lines." (App. 31, 311, 319, 321)

The Milwaukee's entry into Portland is also important because, combined with the so-called Sumas merger condition, it will give the Milwaukee a competitive north-south Pacific Coast route between Canada and Portland and (because of the connection with the SP at Portland) between Canada and the SP territory in Oregon and south or southeast. The Sumas condition (condition 24(b)) involves trackage rights for the Milwaukee for about 100 miles in Washington. (App. 450-451) The I.C.C. aptly summarized the combined effects of the Portland and Sumas conditions:

> "Thus, the Milwaukee, by reaching Portland directly, will be a rate-making transcontinental rail-railroad, not only on traffic moving across the northern tier, but to and from California as well. Likewise, the Sumas condition will allow the Milwaukee to provide rail competition on traffic to and from Canada." (App. 311)

B. **New gateways for the Milwaukee at Spokane and Tacoma.** The opening of eleven new gateways between the Milwaukee and the merged lines, particularly at Spokane and Tacoma, will give Oregon shippers who are located on the merged company's lines or on the SP ac-

[9] As the Commission noted: "Plainly its [Milwaukee's] competitive posture will be enhanced. Indeed, even a North Western-Milwaukee merger will not result in a transcontinental service; only the opening up of Portland to Milwaukee will accomplish that." (App. 323)

cess to new markets and additional points at which transit service can be performed under through rates. The condition (condition 23) specifically provides that transcontinental traffic can be routed by the shippers for interchange with the Milwaukee at these gateways at the lowest level of joint rates that apply on traffic interchanged between the Milwaukee and the merged lines at Minneapolis-St. Paul or Sioux City, Iowa. (App. 449-450)[9] Under the merger, Oregon shippers would definitely gain in the establishment of through routes and joint rates presently unavailable to them. They would also definitely gain from the additional direct service available to them over the Milwaukee.

II. THE CONDITIONS ESTABLISHING A NEW GATEWAY AT KLAMATH FALLS, OREGON, WILL INCREASE RAILROAD COMPETITION AND OPEN NEW ROUTES.

At present two basic routes or sets of gateways are available for railroad shipments moving between Oregon and the Pacific Northwest, on the one hand, and, on the other hand, California, Arizona or New Mexico. One route is operated via Portland and over the single-line service of the SP through California. The other route, "the inside route," operates over a combination of the GN and WP via the Bieber, California, connection with the WP and a connection with the Santa Fe at Stockton, California. As the I.C.C. explained:

"Most of Northern Pacific's California traffic is in-

[9] The Commission has already demonstrated, in this case, how it can and will insure that shippers benefit from that gateway condition. (App. 498-503)

terchanged with SP at Portland, and much of Great Northern's is interchanged with WP at Bieber. Some of the latter traffic is interchanged at Portland and Chemult [Oregon] with SP, but this interchange is limited by the fact that GN is shorthauled thereby." (App. 331-332)

Oregon and its shippers have been concerned with preserving and increasing the competitive position of the inside route which now has its principal gateway and interchange point at Bieber. The merger conditions (conditions 7-16) will open a new gateway at Klamath Falls, Oregon—which is on the present GN line north of Bieber —for interchange between the merged lines and the SP. This results from stipulations entered into by the Northern Lines with the SP, WP and Santa Fe and approved by the I.C.C. (Ex. Nos. 42, 69, 70; App. 331-333, 439-444) These open Klamath Falls as a new point of interchange for the merging lines and the SP on traffic to and from areas west of the Cascades as well as east and to and from points via present NP as well as via present GN routes.

Establishing the Klamath Falls gateway will benefit Oregon shippers, particularly in central Oregon. Shippers will have new competitive routes at Klamath Falls via SP.[9] There will also be new competitive routes opened for SP shippers to eastern Washington and points east of Spokane which will be shorter than the present

[9] As a result of the merger, former NP shippers will have a new competitive route via Bieber, which will improve WP's position with respect to those shippers.

route through Portland. And there will be a shorter route connecting California with Idaho and Montana.

In short, as the I.C.C. found, the establishment of the Klamath Falls gateway will be an integral element in the merger conditions increasing and improving rail competition in this area:

> "The combination of the equilization of opportunities through the Bieber and Klamath Falls (or Chemult or Portland) gateways and the Milwaukee's Portland and Sumas-route (trackage rights) conditions, should aid the establishment of genuine rail competition on the Pacific Coast, to the great benefit of the shipping and consuming public." (App. 332-333)

III. RAILROAD CAR SUPPLY TO OREGON SHIPPERS WILL BE IMPROVED.

Shippers in Oregon have traditionally suffered severe shortages of rail cars. We therefore have a vital interest in any action which might result in increased supplies. Such a result can be expected from the proposed merger as conditioned because:

A. The car ownership of all of the merging lines will be pooled under one unified control. The peak car demand seasons for the Burlington, NP and GN follow each other. Therefore a unified control can shift the supply from area to area to meet the greatest demands.

B. All present points served by each of the individual lines will be "at-home" points for all cars of the entire merged system, thus giving the merged system more "at-home" points relative to their total car supply, at which to receive prompt return of cars from other carriers.

C. Entry of the Milwaukee will make that carrier's car ownership directly available to Oregon shippers for the first time.

D. The shorter more expeditious routes which will result from the merger will reduce car-days required for movement of traffic thus maximizing utilization of car supply.

IV. OTHER RAILROAD SYSTEMS ARE COMPETING AND WILL CONTINUE TO COMPETE VERY EFFECTIVELY WITH THE MERGING LINES AND THE MILWAUKEE.

As indicated above, the merger as conditioned will produce more competitive routes and improved service for shipments moving along the Pacific Coast in north-south directions. With respect to east-west transcontinental traffic, an emphasis upon the competition between the GN and NP and upon the conditions to increase the Milwaukee's competitive services should not be allowed to leave the impression that those are the only railroads effectively competing for such traffic.

After merger, Oregon will have the following railroad systems serving it and competing effectively for transcontinental traffic to Eastern and Midwestern points:

(1) The merged GN-NP system.

(2) The strengthened Milwaukee which, with the Portland condition, will enter Oregon directly and provide single-line service to Chicago and Midwestern points.

(3) The UP, which provides very good east-west service directly from Portland through its Columbia River route in Oregon to Omaha, or Kansas City, and

points east. The UP carries about 23 percent of the total carload freight traffic in Oregon. (App. 986)

(4) The SP, which carries more carload freight traffic in Oregon than any other railroad (App. 986), competes for transcontinental traffic from Portland through its Willamette Valley route to the Ogden, Utah gateway, where its traffic is turned over to the UP or the Denver and Rio Grande for terminations by them or by their connections at eastern points. The SP also competes for its long haul from Portland through California and into St. Louis, with connections there for movement to the East and Southeast.

(5) The WP in connection with the GN competes via the inside (Bieber) route to its eastern junction in Utah where its traffic is turned over principally to carriers competing with the UP. The WP, via the inside route, also forms a transcontinental route in connection with the Santa Fe at Stockton, California. The Santa Fe reaches Chicago with single-line service from Stockton.

V. COMPETITION BETWEEN THE GREAT NORTHERN AND NORTHERN PACIFIC IS TO SOME EXTENT LIMITED BY A COMMUNITY OF INTERESTS.

In weighing the railroad competition that will exist after merger, it is appropriate to point out that the GN and NP now jointly own and control the SP&S and that this circumstance has a limiting effect upon competition between the GN and NP. The SP&S's direct route between Spokane and Portland, and the main lines of both the GN and NP, converge at Spokane. If it were not for

the SP&S, the GN would be required to reach Portland from Spokane via Everett, Washington and the NP would be required to reach Portland from Spokane via Auburn, Washington. (App. 72) Thus, in competing for transcontinental shipments to and from Portland, the best service route for both the GN and the NP is over the SP&S. However, with respect to such traffic the SP&S, being jointly owned, cannot provide rate or service competition that is not mutually agreeable to both the GN and NP.

On the other hand, the fact that the GN and NP can obtain their longest hauls by not utilizing the SP&S means that in some cases both roads have interests in obtaining more circuitous routing. For example, consider a shipment to be moved from Portland to Kansas City. When the GN can obtain the shipment and obtain it for its long haul, the shipment may be routed from Portland north over the GN line through Everett, Washington (instead of over the SP&S to Spokane) and thence to the Twin Cities for interchange with the Burlington for movement south to Kansas City.[8] After merger if that same shipment were obtained the routing will be far less circuitous. It would go over the SP&S line to Spokane, thence along former NP lines to Laurel or Billings, Montana, and over former Burlington lines directly to Kansas City.[9] The merger will produce and encourage faster

[8] Even if that shipment were routed via the SP&S, the GN's long haul would still be via the Twin Cities and thence south to Kansas City rather than via Laurel or Billings, Montana, and thence southwest on the Burlington to Kansas City.

[9] The service will be faster: "Great Northern traffic from Spokane and west thereof through Laurel would be advanced 24 hours in moving via Northern Pacific's short line . . ." (App. 306)

service over the best lines available to the merged company.

CONCLUSION

The merger as conditioned and approved by the I.C.C. will be of substantial benefit to the public, especially to shippers in Oregon. It will strengthen the Milwaukee and also extend the Milwaukee's services directly to Oregon shippers. New competitive east-west and north-south rail routes will be established. In sum, the merger and the specified conditions will create "meaningful rail competition" for both east-west and north-south traffic "to the great benefit of the shipping and consuming public." (App. 333, 344) The other railroad systems that now directly serve and compete in this area will continue to do so and will do so under improved circumstances. The fact that consolidating the GN, NP and SP&S will eliminate the existing competition between the GN and NP does not weigh strongly against the overriding public benefits that will flow from this appropriately conditioned merger.

The I.C.C.'s decision contains adequate, and detailed, findings based on substantial evidence showing that the merger as conditioned is in the public interest. The judgment of the District Court should be affirmed.

Respectfully submitted,

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